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Testimony on:
"FOREST SERVICE REGULATORY ROADBLOCKS TO PRODUCTIVE LAND USE AND RECREATION: PROPOSED PLANNING RULE, SPECIAL-USE PERMITS, AND TRAVEL MANAGEMENT"
before
The U.S. House of Representatives, Subcommittee On National Parks, Forests And Public Lands
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Introduction

I am pleased to be here this morning representing the National Association of Forest Service Retirees (NAFSR) on the subject of the most recent Forest Service draft forest planning regulations released in the Federal Register Volume 76, Number 30, pages 8480-8528, published on February 14, 2011 for public review. The NAFSR is a non-profit, non-partisan organization dedicated to the promotion of the ideals and principles of natural resources conservation upon which the U.S.D.A. Forest Service was founded. It is committed to the science-informed sustainable management of national forests and grasslands for the public good.

NAFSR selected a team of its members to evaluate the most recent draft forest planning regulations proposal. I served as the leader of this team. The team had a combined length of service of more than 150 years and breadth of experience including the Office of General Counsel and former line officers, from District Ranger, Forest Supervisor, Regional Forester, Station Director and Deputy Chief spanning five Regions, an Experiment Station and the Washington Office. We also received individual comments from several of our members that have been incorporated in our response. A number of these comments included information provided to our members by local government officials.

In response to the Agency's request for comments, we provided a detailed written response, including recognition of positive aspects of the draft regulation. I have included a copy of our comments for the Record of this Hearing. In my testimony, I will focus on five key issues: document and process complexity, NEPA requirements and analysis, the diversity requirement, use of best science, and the impact on local communities.

Complexity

We believe that the overall content of the proposed rule is overly ambitious and optimistic, complex, costly, and promises much more than it can deliver. Rather than providing a simplified, streamlined process for developing and amending plans, we fear that the opposite will result. This is especially troubling in what are likely to be difficult times for funding of federal programs of all kinds.

Without addressing the critical issue of the fundamental purposes of the National Forest System in this age of controversy, it is unlikely that any of the current controversies involving the purposes for and uses of national forests and grasslands will be resolved by the proposed rule. This issue must be addressed by Congress if there is to be a change from core principles and purposes as set forth in the Multiple Use Sustained Yield Act (MUSY) and reaffirmed by Congress in the National Forest Management Act (NFMA) of 1976. Nonetheless, the proposed planning regulations purport to establish new purposes and priorities for the national forests and grasslands, such as dealing with climate change and providing "ecosystem services," for which there are no statutory authorities. One might stretch the legal provision of "without impairment of the land" to include management for "ecosystem restoration," however, this should be clearly stated or clarified by Congress.

While the proposed rule is thorough, it is long and tedious to read. At the same time, it is short on useful and workable details—and the devil is in the details. We are told that more information on how the promises in the rule and explanatory materials will be fulfilled will be found in the Forest Service Manual and Handbook Directives to be issued at a later date. Unfortunately, given the lack of trust of the Agency among many of the most vocal and litigious members of the public, this is not likely to bring much comfort. Further, while many of the goals in the proposed rule are commendable, such as coordinating across the landscape, they may be unattainable. **With current and anticipated federal budgets and the low levels of management activity anticipated for National Forest System lands, it may be timely and beneficial to American taxpayers to model forest planning on Chief Pinchot's "The Use of the National Forests" concept.**

NAFSR strongly recommends that the rule for planning national forest and grassland management be simplified to a land-use zoning process with articulation of purposes for and expectations of management activities, uses, and outcomes for each zone. Analyses should reflect only the requirements of MUSY, NFMA, and other relevant federal statutesuch as the Endangered Species Act, Clean Air Act and Clean Water Act.

Forest Planning and NEPA

The proposed planning rule contributes to complexity by forgetting, or perhaps ignoring, a unanimous Supreme Court case that ruled a forest plan, in this case the plan for the Wayne National Forest, did not affect the environment, was not "ripe" and therefore was not judiciable (OHIO FORESTRY ASSOCIATION, INC., PETITIONER *v.* SIERRA CLUB et al. May 18, 1998).

The proposed rule itself is accompanied by a Draft Environmental Impact Statement (EIS) that finds a lack of effect on the environment from a programmatic regulation or forest plan. The Court's decision stated: "As this Court has previously pointed out, the ripeness requirement is designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.' " Clearly, the proposed rule and ensuing forest plans will not have concrete effects on the ground until projects under those plans are actually proposed.

NAFSR strongly recommends dispensing with NEPA requirements for the planning rule and for forest plan revisions and amendments, since there is no commitment to activities on the ground (or preclusion of further plan amendments to allow activities) and no effect on the environment of the planning actions themselves. The intent, however, is not to eliminate the public engagement process in developing forest and grassland plans. In the interest of full display NAFSR would like to see an economic analysis of the cost of implementing the planning rule.

Maintaining Diversity

We are pleased that the proposed rule no longer requires providing for species diversity at the population level and recognizes that Forest Service lands provide only a portion of needed habitat for species as part of a larger landscape. NFMA requires diversity only at the ecological community level. However, the proposed rule does not include the phrase "to meet overall multiple-use objectives" to make clear that the Forest Service obligation to and purpose for providing diversity of plant and animal communities is in the context of the balance required to meet overall multiple-use objectives.

Maintaining viable populations of any species should not be a requirement of the planning regulations because there is no such requirement in the NFMA or any other federal statute. Perhaps this is for good reason, as population viability is an outcome influenced by many factors beyond habitat and outside of the control of a national forest or grassland. Further, it is an outcome only discernible at some distant point in the future. Measuring and proving that a forest plan will "maintain" a viable population is impossible, leaving the Forest Service vulnerable to lawsuits. The proposed rule also creates a new obligation to "conserve" fish and wildlife species that are "candidates" for listing under the Endangered Species Act (ESA). This will require that the agency develop recovery-like plans for conservation of candidate species even though recovery plans are not required for unlisted species by the ESA. It will also provide additional fertile ground for litigation.

Under the Public Trust Doctrine, state and other federal agencies are mandated to manage species viability at the population level. Since maintaining viability of any plant or animal populations remains challenging and technically infeasible, the agency has necessarily relied on surrogates and predictive models to satisfy this requirement. If as we maintain, this requirement is unachievable, the requirement itself may be invalid. Thus, we commend the agency for returning to the original language of NFMA and focusing on maintaining the diversity of plant and animal communities in the planning area with consideration of the role that the national forests and grasslands play in the larger landscape.

The proposed species diversity approach using "fine" and "coarse" filters may be an improvement over the current process, but will also become the subject of future litigation. Additionally the regulation proposes to expand the "maintain viable populations" requirement to include invertebrates such as slugs and insects, plants, and fungi. This will end up continuing the futile exercise of "survey and manage" that brought forest activities to a snail's pace, if not to a grinding halt in the range of the northern spotted owl.

NAFSR strongly recommends reliance on the NFMA requirement for diversity in order to meet overall multiple-use objectives and coordination with the states and other federal agencies responsible for population management under state statutes or the ESA for all other species concerns in forest and grassland planning.

"Use of Best Science"

The Forest Service has chosen to place in regulation at draft Section 219.3 mandatory requirements that the agency extensively document and then determine what constitutes "best available scientific information" in the planning process. While a laudable objective, this requirement is nothing short of astonishing in view of the volume of litigation which has burdened the agency in recent years, much of it involving contested science.

To place such a regulatory burden on the agency is unwise, unnecessary as a matter of policy or law, unfunded, unstaffed and (as far as we know) unprecedented in federal regulation on such a broad scale. Not only must the agency take into account "best science," but such science must be documented and an explanation given regarding how it was considered.

Science does not come labeled "good, better, best" and its adequacy is often a matter of professional judgment or the "eye of the beholder." The draft regulation mandates the consideration of rapidly evolving scientific fields in which there is substantial disagreement within the scientific community. Yet the above quoted regulation would require the responsible Forest Service officer to determine which scientific information is "the *most* accurate and reliable" in every field. This is an impossible burden. Further, there are valid, non-scientific sources of knowledge relevant to forest planning, such as local accumulated wisdom from years of experience and "trial and error."

NAFSR strongly recommends that forest planning use science and other sources of knowledge that are applicable and relevant to inform analyses and decisions.

Impact on Local Communities

The necessity and difficulty of local engagement in planning increases as the agency increases its attempt to plan, coordinate, and implement programs and activities at the landscape level. The Forest Service Planning Regulations should assure Forest Plans are written in partnership with the states in which the National Forest is located and in consideration of local, regional, and national needs and concerns. It is also important to retain intergovernmental coordination in the proposed rule. Communities - including Tribal entities - in close proximity to or socially and economically dependent on a national forest or grassland should be a partner in developing a National Forest Land Management Plan. The final rule should include provisions for land exchanges, conveyances and adjustments with states, communities and tribal entities.

However, while local government coordination is essential, this requirement places a heavy burden on the limited resources available at the local level. This is especially true now as local governments find themselves with reduced budgets and staffing.

Counties and communities will need help, not additional paperwork and staff time.

Concluding Remarks

The Forest Service has attempted in good faith to revise the original planning regulations a number of times beginning in the early 1990's with no real success. My personal experience suggests that the problem is not so much in the process itself but in the polarization of the various interest groups around their individual values and preferences. While values and preferences inform our judgments about what is acceptable and right, rarely do people base their public arguments for or against a proposed action or activity on this basis. Rather, all sides exploit uncertainties in the science to advance their point of view. In response, the Agency produces larger and more complex documents with lengthy discussions of the science. Since the underlying differences in values and preferences are never identified, understood, and evaluated in the final decision, the issues are not resolved and frequently end in appeals and litigation.